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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CAC GROUP, INC., a Delaware corporation,	)	Case No. CV 12-00587 DDP (FFMx)
	)	
Plaintiff,	)	
	)	<b>ORDER DENYING PLAINTIFF'S EX</b>
v.	)	<b>PARTE APPLICATION FOR A TEMPORARY</b>
	)	<b>RESTRAINING ORDER</b>
	)	
MAXIM GROUP, LLC, a New York limited liability company;	)	
EDWARD L. ROSE, an individual,	)	[Motion filed on 1/30/12]
	)	
Defendants.	)	
	)	
_____	)	

Presently before the court is Plaintiff's Ex Parte Application for a Temporary Restraining Order ("TRO") restraining Defendants from transferring any interest in a Promissory Note issued by third party Genova Financial Group Ltd. ("Gerova").

Defendants are the beneficiaries of a Promissory Note("the Note") issued by Gerova, which is organized in Bermuda. Plaintiff alleges that on December 29, 2011, the parties entered into an agreement, under which Plaintiff would purchase the Note for \$250,000. (Complaint ¶¶ 12-13.) Defendants dispute that an agreement was reached. (Opposition at 7.) On January 12, 2012,

1 Defendant Edward L. Rose, Defendant's Vice President and General  
2 Counsel, informed Plaintiff that Defendants had found another buyer  
3 for the Note, and would not be transferring the note to Plaintiff.  
4 (Declaration of Alex. M. Weingarten in Support of Ex Parte  
5 Application for TRO ¶ 20). Plaintiff proceeded to file the instant  
6 suit, and now seeks a TRO preventing Defendant from transferring  
7 the Note to the new buyer.

8 A temporary restraining order is meant to be used only in  
9 extraordinary circumstances. To establish entitlement to a TRO,  
10 the requesting party must show (1) that he is likely to succeed on  
11 the merits, (2) that he is likely to suffer irreparable harm in the  
12 absence of preliminary relief, (3) that the balance of equities  
13 tips in his favor, and (4) that an injunction is in the public  
14 interest. Winter v. Natural Res. Defense Counsel, 129 S.Ct. 365,  
15 374 (2008). A TRO may be warranted where a party (1) shows a  
16 combination of probable success on the merits and the possibility  
17 of irreparable harm, or (2) raises serious questions and the balance  
18 of hardships tips in favor of a TRO. See Arcamuzi v. Continental  
19 Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987). "These two  
20 formulations represent two points on a sliding scale in which the  
21 required degree of irreparable harm increases as the probability of  
22 success decreases." Id. Under both formulations, however, the  
23 party must demonstrate a "fair chance of success on the merits" and  
24 a "significant threat of irreparable injury."<sup>1</sup> Id.

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26 <sup>1</sup> Even under the "serious interests" sliding scale test, a  
27 plaintiff must satisfy the four Winter factors and demonstrate  
28 "that there is a likelihood of irreparable injury and that the  
injunction is in the public interest." Alliance for the Wild  
Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

1 As an initial matter, it does not appear to the court that  
2 Plaintiff's counsel ever notified Defendants of this application. A  
3 court may issue a temporary restraining order

4 without written or oral notice to the adverse party or its  
5 attorney *only if*: (A) specific facts in an affidavit or a  
6 verified complaint clearly show that immediate and irreparable  
7 injury, loss, or damage will result to the movant before the  
adverse party can be heard in opposition; and (B) the movant's  
attorney certifies in writing any efforts made to give notice  
and the reasons why it should not be required.

8 Fed. R. Civ. P. 65(b)(1) (emphasis added); See also C.D. Cal. L.R.

9 7-19.1. Basic principles of due process generally require the  
10 adverse party to have notice and opportunity to be heard. Where  
11 the party seeking relief has had significant notice of the  
12 impending harm, it is inimical to the spirit and intent of those  
13 due process notions - as well as basic concepts of fairness - for a  
14 plaintiff to take an approach which avoids any chance of  
15 determination on the merits. Plaintiff has not provided an  
16 explanation for its failure to provide notice to Defendant.

17 Furthermore, Plaintiff fails to adequately show that it is  
18 likely to suffer irreparable harm in the absence of a TRO.  
19 Plaintiff has invested \$5 million in Gerova. (Application at 1,  
20 9). Plaintiff suggests that it sought to acquire the Note at issue  
21 here in order to protect Gerova from potential creditors and, by so  
22 doing, protect Plaintiff's \$5 million investment. (App. at 7.)  
23 Plaintiff asserts that the new purchaser of the Note is a business  
24 adversary of Gerova, and that the new purchaser will use the Note  
25 to drive Gerova out of business by forcing it into involuntary  
26 insolvency and unwinding in Bermuda. (App. at 2). Plaintiff  
27 further asserts that it "will potentially be destroyed because it  
28

1 will lose all, or substantially all of its Gerova investments."  
2 (App. at 8.)

3 Plaintiff does not provide any explanation of how, aside from  
4 its potential role in larger adversarial business schemes, the Note  
5 is itself unique or why money damages would be an insufficient  
6 remedy for Defendants' alleged breach. Though Plaintiff's  
7 insolvency might constitute irreparable harm, that outcome is  
8 highly uncertain, as Plaintiff implicitly acknowledges by arguing  
9 that, even if Plaintiff's speculative scenario plays out as  
10 described, Plaintiff "will potentially be destroyed." Furthermore,  
11 it does not appear to the court that a TRO is necessary to halt the  
12 transfer of the Note to the new buyer. As Plaintiff itself points  
13 out, the Note contains an anti-assignment clause. (App. at 8-9).  
14 In other words, the Note cannot be transferred to the new buyer (or  
15 any other buyer) without Gerova's consent. In seeking a TRO,  
16 Plaintiff asks that this court restrain Defendant from doing  
17 something that, by Plaintiff's own admission, Defendant cannot  
18 itself do. Under such circumstances, Plaintiff cannot show that it  
19 will suffer irreparable harm in the absence of preliminary relief.

20 For the reasons stated above, Plaintiff's Application for a  
21 Temporary Restraining Order is DENIED.

22  
23 IT IS SO ORDERED.

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26 Dated: February 2, 2012



DEAN D. PREGERSON  
United States District Judge